

continuous portion of the announcement alert the viewer to the essential fact that the infomercial is an advertisement.

While the precise wording of sponsorship identification is traditionally left to the discretion of the broadcaster,⁴⁴

Petitioners suggest the following as realistic options:

- (1) The word "advertisement" placed on top or bottom of the infomercial;
- (2) The word "advertisement" placed in a triangle in a corner of the infomercial;
- (3) A universally recognized logo placed in the corner of the screen.

Any of these options would be at once inobtrusive and effective, thus advancing the purpose of Section 317 without imposing unreasonable burdens on the broadcaster.

This approach, combined with an identification of the sponsoring individual or entity which could be required only at meaningful intervals, is consistent with the Commission's two-part interpretation of Section 317. The Commission's rules require broadcasters to announce (1) the fact that a matter is sponsored by some entity, and (2) the identity of that entity.⁴⁵ These two requirements are severable, and the proposed interpretation of Section 317 is consistent with existing interpretations of the content of required identification.

⁴⁴ National Broadcasting Co., Concerning Sponsorship Identification, 27 FCC 2d 75 (1970).

⁴⁵ 47 C.F.R. § 73.1212(a)(1), (2).

C. The Proposed Interpretation Of Section 317 Is
Consistent With Commission Practice.

The Commission has held that market changes are a critical factor in regulatory decision-making.⁴⁶ Deregulation of television was premised, in part, on the view that the market was constraining commercialization more efficiently than existing regulation.⁴⁷ As discussed above, deregulation itself unleashed market forces which have fundamentally altered this segment of the market. We are now in a radically different market than we were in forty, or even seven, years ago -- a market which requires the Commission to revisit the issue of sponsorship identification.

The requirements now found in Section 73.1212(f) have remained essentially unchanged over the past 40 years.⁴⁸ This rule applies to "programs advertising commercial products or services." Of course, the infomercial significantly post-dates the adoption of this language and could not have been an advertising format which was contemplated by the original rule.

While the provisions of this rule have not changed over time, the world of commercial advertising has changed. Specifically, program-length commercials have been resurrected

⁴⁶ See, e.g. Commercial TV Stations, Notice of Proposed Rule Making, 94 FCC 2d 678 (1983).

⁴⁷ Commercial TV Stations, supra n.13.

⁴⁸ See Sponsor Identification of Broadcast Stations, 6 RR 835, 15 Fed. Reg. 6974 (1950); Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, Report and Order, 34 FCC 829, 844 - 845 (1963).

and have transformed television advertising. This transformation has sapped the vitality of Section 317, and calls for regulatory action.

IV. Declaratory Relief Or Rulemaking Concerning Sponsorship Identification Of Infomercials Should Also Apply To Cable Television.

Similar transformations in the television industry call for an expansion of the Commission's rules to include cable television. Petitioners ask the Commission to consider the application of the sponsorship identification rules to cablecasting. Petitioners believe that such an application is within the Commission's authority, is consistent with past Commission actions, and is critical for the effective regulation of infomercials.

The Commission's authority to apply sponsorship-identification rules to cable derives from sections 303 and 317 of the Communications Act. Section 303 empowers the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."⁴⁹ Section 317 requires sponsorship identification and authorizes the Commission to create necessary rules and regulations.⁵⁰

The Commission has already used this authority to apply the commercial sponsorship identification rules to cablecasters who

⁴⁹ 47 U.S.C. 303(r).

⁵⁰ 47 U.S.C. 317.

engage in origination cablecasting.⁵¹ In the political advertising context, the Commission has noted that the same sponsor identification rules should apply to broadcast and cable absent a reason for distinguishing between the two.⁵²

In the case of infomercials, there is a compelling reason for application of new interpretations to cable. Cable is a major carrier of infomercials, and its role will grow in the future.⁵³ Effective regulation of infomercial sponsorship identification requires a ruling which applies to cablecasting as well as broadcasting.

Such a ruling would not violate the Cable Act of 1984. Section 544(f) of the Act prohibits the Commission from imposing "requirements regarding the provision or content of cable service, except as expressly provided." 47 U.S.C. 544(f). This prohibition bars the Commission from requiring or forbidding the carriage of specific programming, but allows regulation which is "content neutral."⁵⁴

In United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit provided the definitive analysis of the scope and limits of the

⁵¹ Cable Television Report and Order, 36 FCC 2d 143, 238 (1972), modified on reconsideration, 36 FCC 2d 326 (1972).

⁵² See, e.g. Amendment Of The Commission's "Sponsorship Identification" Rules, 52 FCC 2d 701, 712 (1975).

⁵³ See supra nn.25-29 and accompanying text.

⁵⁴ United Video, Inc. v. FCC, 890 F.2d 1173, 1188-89 (D.C. Cir. 1989).

Cable Act. Upholding the Commission's syndicated exclusivity rules, the United Video court held that the Cable Act's prohibition does not apply to "content neutral" regulation. A regulation is "content neutral" when it does "not require carriage of any particular program or type of program, nor ... prevent a cable company from acquiring the right to present, and presenting, any program."⁵⁵

The sponsorship-identification rules are "content neutral" as defined by United Video. Operation of the rules is triggered by the payment of consideration to a cablecaster in exchange for carriage of a program-length commercial, and the sole effect of the rule is the inclusion of meaningful identification of the sponsor. Like the syndicated exclusivity rules, these rules neither require nor prohibit the carriage of any program or type of program. Rather, the sponsorship-identification rules only incidentally affect the carriage of particular programs by requiring the carrier to meaningfully identify the sponsor of advertisements. That is, these rules affect only the manner in which certain programs are presented, and not the ability to present them. As such, the proposed interpretation would not violate the Cable Act.⁵⁶

⁵⁵ 890 F.2d at 1189.

⁵⁶ Further support for the Commission's authority to apply its interpretation of the sponsorship-identification rules to all cable-casters is found in Section 544(f)(2) of the Cable Act. That section excludes the amendment of pre-existing rules from the general prohibitions found in Section 544(f)(1). Here, petitioners ask the Commission to amend a rule which was in effect prior to the adoption of the Cable Act, in a manner not

Petitioners realize that the Commission may be unwilling to immediately extend the sponsorship identification rules to all cable casters. If that is so, petitioners note that clarification of the Commission's jurisdiction over cable would be fostered by a rulemaking proceeding at this time. The Commission, in moving toward revised rules on sponsorship identification, may simultaneously move toward a resolution of this jurisdictional question.

V. Conclusion

The infomercial is a commercial form designed to exploit audience unawareness that they are watching advertising. Use of this technique, formerly controlled by the Commission, has exploded in recent years in response to a gap created by the deregulation of television. Manipulation of this gap thwarts the policy underlying Section 317 and the Commission's current regulations.

If the sponsorship identification and public interest requirements mean anything, they should at least require infomercial carriers to fully, continuously, and openly inform the public who is persuading them. Continuous sponsorship identification during an infomercial is the only way to protect the public and fulfill the objectives of Section 317, and Petitioners respectfully request that the Commission issue an

inconsistent with the express provision of the Act. Such an amendment is allowed under 47 U.S.C. 544(f)(2).

interpretation of Section 317 and its existing rules which makes such a requirement clear.

Respectfully submitted,

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